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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of
Amendment of Part 74
of the Commission's Rules
With Regard to the
Instructional Television Fixed
Service

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MM Docket No. 93-24

To: The Commission

COMMENTS

Hispanic Information and Telecommunications Network, Inc., ("HITN"), by its counsel, hereby submits its Comments with respect to the above-referenced proceeding.¹ HITN concurs with the FCC's goal of enhancing the efficiency of the processing of ITFS applications. However, HITN believes that many of the measures proposed by the Commission are unnecessary to achieve the laudable goal of streamlining ITFS application processing. Consequently, HITN will submit comments designed to assist the Commission reach methods of preserving its scarce resources while allowing the Commission to process ITFS applications more efficiently.

I. General Observations

"Our goal in this proceeding is to enhance the efficiency of our processing of ITFS applications." This statement by the Commission at the beginning of the Order and Further Notice of Proposed

¹ Comments were required to be filed by August 29, 1994. See Order and Further Notice of Proposed Rulemaking, FCC 94-148, released July 6, 1994. Consequently, the HITN Comments are timely filed.

Rulemaking ("Further Notice"), MM Docket No. 93-24, released July 6, 1994, is the conceptual underpinning for all the changes suggested therein. However, under the guise of enhancing application processing, the Commission is proposing rules changes which have little or nothing to do with the efficiency of application processing, and everything to do with limiting the field of potential applicants. Put another way, almost every provision of the Further Notice will increase, not decrease, the processing burden on the FCC. Moreover, the implementation of all of the Commission's proposals will make it more difficult for educational entities to obtain ITFS licenses.

Furthermore, almost every provision of the Further Notice seems to be aimed at the national ITFS licensees like HITN. The Further Notice is full of references to potential and actual abuses of the Commission's rules, ITFS "speculators", and other parties who in the Commission's eyes are intent on otherwise manipulating the Commission's rules with respect to the ITFS service. It would appear these are thinly-veiled, and undeserved, references to National ITFS licensees.²

² This may be part of a growing trend within the industry to paint National licensees as somehow being part of the perceived problem, rather than the solution. This propaganda cannot work, because it is not true. It must be remembered by everyone, including the Commission, that virtually no application, amendment, pleading, petition to deny or other part of the application process gets filed at the FCC without someone other than the educational entity paying for it. In almost every case, it is a member of the wireless cable industry paying for this piece of paper. And in almost every case, if the wireless cable industry member were not paying for it, it would not get filed. So, if the WCA has a problem with the conduct of some of its members, then it should look within to solve it, and not use the Commission's processes as a guise for its imposing its will on the members of the industry WCA represents.

The Commission sees problems where they don't exist. It would appear from a reading of the Further Notice that it is a certainty based on experience that speculators seeking to warehouse channels will somehow scuttle any progress made by the new window procedure. The fact of the matter is, experience indicates that no such thing has happened to date.

Furthermore, there are very few ITFS channels left to warehouse, if anyone was so inclined to do so. Most of the truly desirable ITFS licenses, i.e., in the top fifty markets, have been issued and licensed at this point in time. In fact, by HITN's count, four or more channel groups have been licensed and/or applied for in forty-eight of the top fifty ADI markets. Remarkably, two or more channel groups have been licensed and/or applied for in 437 markets across the United States.³ Because of the infusion of funding into the wireless cable industry through public offerings of various sizes, wireless cable systems are being constructed at the most rapid pace in the history of the industry, diminishing the likelihood and desirability of warehousing channels with every passing day.

II. Enhancing the Efficiency of Processing ITFS applications.

As noted above, almost every major proposal contained in the Further Notice to improve the application process will increase, not decrease, the processing burden on the Commission. Generally, each new requirement will giving opposing applicants more colorable reasons to file petitions to deny. These petitions tangle up the Commission's

³ These figures are based on the information contained in the FCC's Fair Report, All ITFS Stations by State and City, dated June, 1994.

processing schemes and prevent the quick grant of ITFS licenses.⁴ Specifically, several of the proposals clearly will increase, not decrease, the processing burden on the Commission.

1. Financial Qualifications

The proposed changes in the requirements regarding an applicant's financial qualifications at this point in time will be clearly antithetical to the Commission's stated goal. It will increase the information in the application. It will provide more ammunition to litigious opponents of the application, resulting in more petitions to deny and further delay of processing. All so that publicly traded corporations, as lessees, with assets and available funds in the hundreds of millions of dollars, can demonstrate they have the wherewithal to construct the proposed wireless system.⁵

2. Application Caps

In theory, this may be a good idea. In practice, such a cap will lead to more litigation, as those unscrupulous "speculators" set up straw men as applicants to try to circumvent the Commission's cap on applications.⁶

3. Expedited Consideration of Applications

This relief already exists in the form of a Special Temporary

⁴ However, perhaps not coincidentally, each of the proposals will also make it more difficult for ITFS entities in general and national ITFS entities in particular, to obtain licenses.

⁵ This situation would be analogous to the situation facing cellular applicants in the top 30 markets, many of whom were publicly-traded corporations, whose financial qualifications were challenged at every turn.

⁶ HITN believes this proposal to be wrongheaded for the various reasons discussed below.

Authority. There is no need to duplicate the system already in place.⁷

4. Receive Sites

The proposed changes here are duplicative. Nonlocal applicants have for years been required to submit commitment letters on accredited school letterhead showing the school's commitment to act as a receive site.

5. Minor Changes

There is no reason to change the classification of any of the minor changes to major changes. Turning minor changes into major changes, and requiring such changes to be filed during window periods, can only slow the licensing process further. Making the licensing process more difficult will not achieve the Commission's dual goals of promoting the wireless cable industry and assisting the development of educational television services such as ITFS. In fact, the Commission would help this industry more by redefining some of what are now major changes as minor changes, to reduce the number of instances when the public notice procedure is required.

III. Other Objections to ITFS Processing Proposals

Aside from their increasing the processing burden on the Commission, the proposals are objectionable on other grounds.

1. Financial Qualifications

This requirement is not simply necessary, as the current system

⁷ Furthermore, this proposal becomes completely unnecessary unless the rules are changed to require the Commission to issue an order granting such a request for expedited action within a brief time after it is filed.

works fine the way it is currently structured. ITFS channels are not being warehoused. As noted above, they are being built at a rapid pace. Overall, there is a huge infusion of capital into the wireless industry through the private sector, which is then funnelled to applicants through airtime lease agreements. The present rules which require the applicant to certify that such funds are available at the time the application is filed, has proven that it works. There is no reason to increase this burden, especially for educators. This proposal would simply result in more noncommercial entities failing to obtain ITFS licenses, increased litigation before the FCC, and further de facto reallocation of ITFS spectrum directly to the commercial operators.

2. Application Caps

This is clearly discriminatory against National educational operators. There already is in effect a very effective prevention against filing abuses, which is the four-channel rule. There is absolutely no reason to limit the amount of applications one applicant wishes to file in different markets, especially in light of the current lack of available channels in desirable markets. Furthermore, since the current comparative criteria award an absolute preference to local applicants, there is no need to prevent a nonlocal applicant from applying in a market where it will eventually lose to a local applicant. The scarcity of big city channels and the decisive preference for local schools are two strong reasons to dissuade a nonlocal applicant from applying in markets in which it does not have a genuine interest. An artificial barrier like an application cap is

simply not necessary.⁸ Furthermore, as the Commission notes, the goal is to speed up the construction of wireless cable systems, not slow their growth, which is what will happen under the application cap.

3. Expedited Consideration of Applications

As noted above, this relief already exists in the form of a Special Temporary Authority. There is no need to duplicate the system already in place. In addition, this will create an artificial pecking order of processing applications at the Commission, which may or may not result in quicker construction of wireless systems. As noted above, this rule will be ineffectual unless the rules are also changed to require the Commission to issue an order granting such a request for expedited action within a brief time after it is filed. Also, there should be some form of punishment built into the rules for someone who is granted expedited consideration and fails to meet the required timetables at any stage of the process. Forfeiture of the underlying conditional authorization, for example, would be an appropriate penalty for wasting the Commission's resources and displacing applicants from the processing line.

4. Four Channel Limitation in Section 74.902(d)

47 C.F.R Section 74.902(d) precludes the assignment of more than four ITFS channels to the same licensee for use within the same area of operation. Section 74.902(d) defines an area of operation as "the

⁸ The Commission notes that commenters cite to the limited number of filings in the Low Power Television Service Window. This reference is inapposite, since the LPTV rules also allow a party to own more than one license in the same market. Consequently, the potential for warehousing channels is more acute under those rules.

area in which the use of channels by one licensee precludes their use by other licensees". This contradicts the statement by the FCC that "we have not clearly defined what constitutes an 'area of operation' for the purpose of the rule." This is not for lack of trying on HITN's part. In a case brought by HITN, the United States Court of Appeals for the District of Columbia Circuit addressed this rule in Hispanic Information and Telecommunications, Inc. v. F.C.C., 865 F. 2d 1289 (D.C. Cir. 1989). The Court stated that:

"The suggestion appears to be that, even where a particular licensee's stations utilize more than four channels within a given area, the purposes underlying the rule are not implicated so long as only four channels of programming are presented. With respect, we believe that such a notion fundamentally misconceives the purposes behind the four-channel rule. The evil inherent in a licensee's 'monopolization' of the spectrum does not lie in the danger that a single programmer will present too much information. The problem, rather, is that *other applicants will be excluded from the airwaves*, and that the range of programming available to the public will consequently be less diverse" (Footnote omitted.)

In the past, the "area of operation" was defined on the basis of interference, not a simple mileage separation as proposed in the Further Notice. Adopting a standard such as a mileage separation of 20 miles could result in station the incongruous situation where two stations might prevent each other from operating, but would be considered in two different areas of operation. Consequently, HITN would support the principle that two sites would be in different areas of operation, as long as one could operate at maximum authorized power

on the same channel at each site without co-channel interference.⁹

5. Protected Service Areas

HITN concurs with the Commission that the rules extending protected service areas to ITFS licensees should not be used as an anti-competitive device to obstruct new and improved ITFS service. At the same time, HITN fails to see why an existing facility should be barred from seeking to protect its service area. The most common anti-competitive practice with respect to the filing of protected service area requests comes from operators who find schools to apply for ITFS stations in small markets which ring the perimeter of a larger market. This circle then creates an enclosure of interference constricting if not shrinking the service area in the larger market. The new proposal would condone this improper practice, hindering the orderly development of wireless cable systems in large markets. Without this foundation of service in large markets, the wireless industry will never be able to compete with the coaxial cable industry. Consequently, whichever rule the Commission adopts should contain an exception to allow existing facilities to receive a protected service area, the receipt of which will be applied

⁹ HITN suggests that now is the most appropriate time for the FCC to define the term mutual exclusivity as it applies to ITFS applications. On at least one other occasion the Commission has admitted that "The term 'mutual exclusivity' is not defined in the ITFS rules." See Letter from Barbara Kreisman, Chief, Video Service Division to HITN, Regarding HITN's Petition For Reconsideration in Phoenix, Arizona, dated March 16, 1993, page 3. It is critical that this omission in the Commission's rules regarding perhaps the most fundamental issue in the processing of applications be corrected before the Commission adopts new processing rules and lifts the application filing freeze.

retroactively as well as prospectively.¹⁰

6. Receive Site Interference Protection

The Commission seeks to enhance processing efficiency, and then proposes in effect to expand the protected service area from 15 miles to 35 miles. The Commission should keep it simple, rather than using two different distances for interference protection.¹¹ Receive sites within the 15-mile protected service area should be protected.¹² Receive sites beyond the 15-mile protected service area should not be protected. To do otherwise will open the door to a hodgepodge of interference requests that will stymie the entire processing scheme. It will also allow the potential for substantial abuse by parties seeking to block service into outlying areas beyond the boundaries of established wireless markets.

7. Accreditation of Receive Sites

This is a blatant attack on the National ITFS licensees, since local accredited schools need not provide school letters for their

¹⁰In fact, the most efficient approach would be to give universally extended 15-mile protected service areas to a existing licensees and applicants immediately, to the extent they have such reach after considering all previously filed applications. Further, the Commission should then assume the need for a 15-mile service area for all new application unless the applicant specifically declines a standard protected area.

¹¹It is not unreasonable to require applicants requesting extraordinary receive site distances to use extraordinary equipment, rather than the Commission providing extra ordinary protection zones, at the expense of spectrum efficiency.

¹²If a 15-mile protected area is automatically included in every authorization, the Commission and the public would no longer have to apply for and/or study receive sites within that distance, greatly simplifying the processing of most ITFS applications.

receive sites. Besides the biased nature of the proposed rule change, there once again would not appear to be any need to change the regulations in this area. Furthermore, the Commission misstates the purpose of the ITFS service, stating that the "fundamental;" purpose of the service is to "serve the educational needs of accredited institutions." This is just not correct. The fundamental purpose of the ITFS service is to educate. Persons needing an education are just as likely to congregate at libraries, community centers, and even the home as they are in a classroom on a school campus. The antiquated notion that people can only be educated in the classroom is refuted by the very existence of the ITFS service. Delivery of educational programming to students wherever they may be is the fundamental principle of the ITFS service. Consequently, the number of accredited receive sites, as long as there is at least one, is irrelevant.

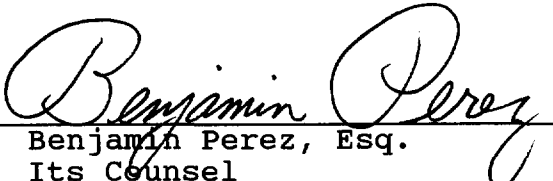
In summary, most of the ITFS rules are working well as currently constituted. Within those rules this industry is growing rapidly. The shortage of capitol that previously delay industry growth has largely abated. Changes in these rules will not resolve the imagined problems, as premised by the NPRM, but will create new problem with resultant processing delay. The best "fix" is to NOT perturb the system to which everyone is now accustomed. The proposed added restriction will merely complicate processing by increasing the number of listed receive sites in each application just to meet this new hurdle. Efficiency of spectrum use will be decrease, because needed education services to homebound student, parents of infant children,

the handicapped, service worker that cannot attend day-time classes and poor people that cannot afford tuition will be sacrificed in favor of school based, classroom constrained use of these channels. Those with access already will get more; those without will get none.

WHEREFORE, the foregoing premises considered, HITN respectfully requests that Commission incorporate the comments of HITN into the new regulations proposed to enhance the processing of ITFS applications.

Respectfully Submitted,

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